SUPREME COURT, U. S.
FILED
DEC 22 1967
JOHN F. DAVIS, CLERK

No. 187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MENOMINEE TRIBE OF INDIANS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Claims

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE

ARTHUR LAZARUS, JR.
General Counsel, Association on American Indian Affairs, Inc.
1700 K Street, Northwest
Washington, D. C.

Of Counsel:

STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 187

MENOMINEE TRIBE OF INDIANS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE

STATEMENT OF INTEREST

The Association on American Indian Affairs, Inc., a non-profit membership corporation chartered under the laws of the State of New York, is devoted to protecting the rights and promoting the welfare of American Indians. The largest Indian-interest organization in the country, the Association supports or conducts develop-

ment programs among Indian communities which range from Eskimo villages north of the Arctic Circle in Alaska to the newly recognized Miccosukee Tribe residing in the Florida Everglades. Because of its deep and longstanding concern with the rights of Indians under the Constitution, statutes and treaties of the United States, the Association has submitted briefs, *amicus curiae,* to this Court in *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), and *Puyallup Tribe* v. *Department of Game,* No. 247, October Term, 1967, and to various Federal Courts of Appeals in such leading cases as *Oliver* v. *Udall,* 306 F. 2d 819 (D.C. Cir. 1962), *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (8th Cir. 1956), and *Arizona* v. *Hobby,* 221 F. 2d 498 (D.C. Cir. 1954).

The Association's particular interest in the case at bar is to assist the Menominee Indians in their effort to recover from the tragic impact upon their economy of the premature termination of Federal services under the Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. 891 *et seq.* Though once relatively prosperous in comparison with other Indian tribes, the Menominees are known to have become increasingly destitute since passage of the 1954 Act. See, for example, 111 *Cong. Rec.* 5922-923 and 22929-930 (remarks of Senator Proxmire, March 25 and September 7, 1965) and 6390 *et seq.* (remarks of Congressman Laird, March 30, 1965). Accordingly, as a matter of necessity and as their ancestors did in bygone years, many tribal members today still depend upon subsistence hunting for a significant portion of their livelihood. It is to safeguard this essential present activity and thus to maximize future tribal resources that the Association here urges this Court to affirm the decision below, holding that the

Menominees have a treaty right to hunt on reservation lands without regard to State law, and to reject the contrary ruling of the Wisconsin Supreme Court in *State* v. *Sanapaw,* 21 Wis. 2d 377, 124 N.W. 2d 41 (1963).

The Association also has an abiding interest in resolution of the broad legal issue posed in the case at bar as to the extent rights enjoyed by Indian tribes under treaties or special statutes may survive general language in a termination act providing, *inter alia,* that "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." Act of June 17, 1954, *supra,* 25 U.S.C. 899. As is pointed out in the opinion below (Appendix, pp. 19-21), the United States District Court in Oregon and a lower State court both have construed an identical section of the Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. 564, 564q, as leaving unimpaired the treaty right of members of the Klamath and Modoc Tribes to hunt inside their diminished reservation without regard to State law. Moreover, the Association has just filed a brief *amicus curiae* in *Reyos* v. *First Security Bank,* Civil No. C-39-65, now pending before the United States District Court for Utah, which argues that certain assets of the so-called mixed-blood Utes remained trust or restricted property even after issuance of a termination proclamation pursuant to the Act of August 27, 1954, 68 Stat. 868, 25 U.S.C. 677, 677v. A decision by this Court on the immediate issue of Menominee hunting rights, therefore, will have ramifications in Indian country far beyond the borders of the State of Wisconsin.

This brief is filed pursuant to Rule 42(2) of the Supreme Court Rules. Written consent of all parties to its submission accompanies the signed original copy of the brief.

QUESTION PRESENTED

Whether the 1954 Menominee Termination Act, which is silent about hunting and fishing rights, by implication repealed the right of Menominee Indians under the Treaty of May 12, 1854, 10 Stat. 1064, to hunt on reservation lands without regard to State law.

ARGUMENT

I. The Menominee Indians Have a Property Right Under the Treaty of May 12, 1854, To Hunt on Tribal Lands Without Regard to State Law.

In Article 2 of the Treaty of May 12, 1854, *supra*, the United States granted to the Menominee Indians "for a home, to be held as Indian lands are held," a tract of land in the State of Wisconsin which constitutes, with exceptions not here material, the present-day Menominee Reservation. At the time of the 1854 Treaty, State law did not apply to the activities of Indians within the Menominee Reservation or, for that matter, with respect to Indian affairs on any other tribal lands within the State of Wisconsin. The Court of Claims in this case and the Wisconsin Supreme Court in *State* v. *Sanapaw, supra,* both have ruled that the 1854 Treaty thus vested in the Menominee Indians a right to hunt on their reservation lands without regard to State law. These holdings are consistent with the decisions of this Court and lower Federal courts that, since Indian treaties contemplate retention by the tribes in lands set aside for their use of all previously existing privileges and immunities, the right to hunt

or fish within the boundaries of a reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing. *United States* v. *Winans,* 198 U.S. 371, 381 (1905); *Moore* v. *United States,* 157 F. 2d 760, 765 (9th Cir. 1946); *Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore. 1956); see *Winters* v. *United States,* 207 U.S. 564 (1908).

The Federal Government's grant of land to the Menominee Tribe under the 1854 Treaty, and the corollary right of the Indians to hunt on their reservation without regard to State law, furnished a major part of the consideration for the cession to the United States of substantial and valuable interests in other lands possessed by the Menominees under the Treaty of October 18, 1848, 9 Stat. 952. The right to hunt free of interference from the State of Wisconsin, therefore, just as much as the land itself, constitutes a compensable property interest, the taking of which may not be accomplished without action of Congress and payment of just compensation. *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937); *United States* v. *Winans, supra; Whitefoot* v. *United States,* 293 F. 2d 658, 663 (Ct. Cl. 1961); *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452, 468 (Ct. Cl. 1959).

II. The Treaty Right of Menominee Indians To Hunt on Tribal Lands Without Regard to State Law Survived the Menominee Termination Act of June 17, 1954.

Section 10 of the Menominee Termination Act of June 17, 1954, *supra,* 25 U.S.C. 899, provides in part that, following publication of a proclamation to such effect by the Secretary of the Interior in the *Federal Register,* "all statutes of the United States which affect

Indians because of their status as Indians shall no longer be applicable to the members of the [Menominee] tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." With the possible exception of a requirement that the Menominee termination plan include provisions for "protection of the water, soil, fish and wildlife" (25 U.S.C. 896), the 1954 Act is wholly silent about hunting and fishing within the Menominee Reservation. After a detailed study of its legislative history, the court below concluded that Congress, in making certain "statutes of the United States" inapplicable to the Menominees under Section 10 of the 1954 Act, did not also intend to abrogate the tribe's right under the Treaty of May 12, 1854, *supra*, to hunt on the reservation without regard to State law. Appendix, pp. 13-18.

Giving continued vitality to their treaty hunting right, even after the effective date of a statutory termination proclamation, is not inconsistent with the responsibilities of Menominee Indians as citizens or with their general amenability to State law. Indeed, this Court and lower Federal courts repeatedly have ruled that Indians may exercise special treaty hunting and fishing rights off their reservations where they otherwise are completely subject to State jurisdiction. *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *United States* v. *Winans*, *supra*; *Holcomb* v. *Confederated Tribes of the Umatilla Indian Reservation*, 382 F. 2d 1013 (9th Cir. 1967); *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F. 2d 169 (9th Cir. 1963). Moreover, in authorizing the extension of

State civil and criminal jurisdiction upon Indian reservations as part of an overall policy to bring all citizens under the same laws, Congress still expressly excluded from coverage every right, privilege and immunity afforded under Federal treaty to any Indian or Indian tribe "with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." Act of August 15, 1953 (Public Law 280), 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360; see *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 56-57 (1962). In short, like the oil operator, the farmer or the small businessman, Indians can be full citizens and yet enjoy rights not shared by their fellow citizens.

Giving continued vitality to the Menominees' reservation hunting right under the 1854 Treaty also will not interfere with operation of a sound State conservation program. When the issues in this case were before the Wisconsin courts, Judge Fischer of the Shawano-Menominee County Court found that tribal members engaged in hunting primarily to supplement an inadequate diet (Appendix, pp. 47-48), while the State of Wisconsin apparently made no showing that such activities had any material adverse impact upon the supply of game. Significantly, in comparable litigation where the requirements of conservation have been fiercely contested and a detailed factual presentation has been made with respect thereto, the lower Federal courts uniformly have determined that Indian hunting and fishing for subsistence purposes constitute only a minor fraction of the total harvest, and that, if necessary, preservation of these natural resources easily could be accomplished by additional restrictions upon commercial fishermen and/or sportsmen who do not possess treaty rights. *Maison* v. *Confederated Tribes*

of the Umatilla Indian Reservation, supra; Makah Indian Tribe v. *Schoettler,* 192 F. 2d 224 (9th Cir. 1951); *Confederated Tribes* v. *Maison,* 262 F. Supp. 871, 872 (D. Ore. 1966), aff'd. *Holcomb* v. *Confederated Tribes, supra; Confederated Tribes* v. *Maison,* 186 F. Supp. 519, 520 (D. Ore. 1960).

Repeals by implication are not favored, and "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Improvement, Slide & Boom Co.* v. *Cox,* 291 U.S. 138, 160 (1934); see also *Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). The case at bar lacks any justification for retreat from this general rule. The language of the 1954 Menominee Termination Act simply does not provide, and there is no valid basis in its legislative history or in public policy for holding, that the Menominees have lost their treaty right to hunt on the Menominee Reservation without regard to State law.

CONCLUSION

For the Menominee Indians, the termination of Federal services under the 1954 Act has proved an economic and social disaster. One major disturbing element in the community is the outstanding conflict in judicial rulings which subjects tribal members engaged in subsistence hunting to prosecution by State authorities for exercising a treaty right found by the Court of Claims still to exist. The Menominees both need and want that treaty right, and Congress certainly has not manifested a clear intent to take it away. Accordingly, for the reasons heretofore given, the Association urges this Court to affirm the decision below and at the same time

specifically to reject the contrary holding of the Wisconsin Supreme Court in *State* v. *Sanapaw*, *supra*.

Respectfully submitted,

ARTHUR LAZARUS, JR.
General Counsel, Association on American Indian Affairs, Inc.
1700 K Street, Northwest
Washington, D. C.

Of Counsel:

STRASSER, SPIEGELBERG, FRIED, FRANK & KAMPELMAN